IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 63 OF 2000

1. Mr. Felix Fernandes,
son of late Mathel Maria
Fernandes, major,
driver, and his wife;

2. Mrs. Leopoldina Fernandes,
major, housewife, both residents
of H.No. 6/203-A, Cobrawado,
Calangute, Bardez, Goa.

3. Mr. Caetano Fernandes
major, married, Driver,
r/o Cobrawado, H.No.B/203;

3b.Mrs Caetano Fernandes,
Cobrawado, H.No. B/203;

4. Mr. Peter Fernandes,
major, unmarried, Businessman;

5. Mr. Jeronimo Fernandes
major, unmarried,
both residing at H.No.6/203,
Cobrawado, Bardez, Goa. .... Appellants

V e r s u s

1. Mr. Antonio Lobo,
son of late Dr. Jose Lobo,
major, married,
Advocate;

2. Mr. Mario Lobo,
son of late Dr. Jose Lobo,

major, married, landlord,
both residents of Feira Alta,
Mapusa, Bardez, Goa. .... Respondents

Mr. Nitin Sardessai, Counsel for the Appellants.

Mr. V. P. Thali, Advocate for the Respondents.

CORAM : **N.A.BRITTO, J.**

DATE : **20th January, 2006.**

JUDGMENT

This is defendants' Second Appeal arising from Special Civil Suit No.157/1989.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. This Second Appeal was admitted by Order of this Court dated 25.08.2000, but in view of concession made on behalf of the defendants, the hearing of the appeal has been restricted to the following substantial questions of law:-

(a) Whether the trial Court was right in deciding issue no.3, which was an issue on defendants' claim of Mundkarship in respect of the suit structures in view of the specific and express bar on the Civil Court's jurisdiction to decide the said issue in terms of Section 31(2) of the Goa Daman and Diu Mundkar (Protection from Eviction) Act, 1975.

(b) Whether the Courts below erred in granting the Order of mandatory injunction ordering the demolition of extensions identified under alphabet 'E' and 'C' and the new structure identified under letter 'D' when the suit for the demolition of the suit structures was barred by law of Limitation in view of the averments in the plaint.

4. There is no dispute that the plaintiffs are the owners of the property known as "*Tropa*" or "*Seliem Bhat*" under survey no. 211/1 situated at Cobrawado, Calangute. There was also no dispute that the defendants have been residing in the house identified by letter 'B' as the original house of the defendants and according to the plaintiffs, the said original house admeasured about 82 square metres. The plaintiffs did not

seek the eviction of the defendants from the original house identified by letter 'B', but, with the allegation that the defendants did extensions/encroachments identified by letter 'A' admeasuring 36 square metres in or about December, 1987; identified by letter 'C' admeasuring 25 square metres in or about October 1983; identified by letter 'D' admeasuring 33.725 square metres in the year 1978 and identified by letter 'E' admeasuring 9.125 square metres in October, 1983, filed the suit for

> (a) demolition of the said structures identified by letters 'A', 'C', 'D' and 'E' in the plan annexed and to restore the suit property in its original condition to the plaintiffs and to close the door opened on the western side, and
>
> (b) to restrain the defendants by way of permanent injunction from interfering in any portion of the suit property in any manner whatsoever or from doing any construction of whatsoever nature in the suit property.

5. The defendants contested the suit, inter alia, stating that the defendants were residing in all the suit structures as Mundkars for the last many years and prior to that their ancestors were residing in the same in

the said capacity and in peaceful physical possession and enjoyment of the same. The defendants further stated that the structures 'A', 'B' and 'C' as alleged by the plaintiffs are together the ancestral house of the defendants which was constructed by the said ancestors of the defendants more than 100 years back with the permission of the ancestors of the plaintiffs and that the said house was reconstructed at their own cost and was lying in the same way, position, direction and within the same plinth area from the year 1945.

6. The learned trial Court framed several issues and one of the said issues was issue no.3 i.e. “Whether the defendants prove that they are residing in all the suit structures as Mundkars for the last many years since the time of their ancestors”, and the said issue came to be answered partly in the affirmative by the learned trial Court in that the learned trial Court held that the defendants had failed to prove this issue in respect of all the structures claimed to be mundkarial ones but at the same time also held this issue partly in the negative, since the demarcation made by the Mamlatdar covered the extensions in the mundkarial area and ordered the demolition of the remaining portions i.e. excluding the area marked on plan Exhibit P-6.

7. The learned First Appellate Court dismissed the appeal filed and ordered the demolition of all structures, (except structure 'B' regarding which no eviction was sought.

8. As regards question (a), Shri Sardessai, the learned Counsel on behalf of the defendants, has submitted that issue no.3, as framed could not have been decided by the learned Civil Judge and had to be referred to the Mamlatdar and, in this context, Shri Sardessai has placed reliance on a Judgment of this Court in the case of ***Porbuko Uma Mandrekar & Ors. Vs. Wencesslay Alex D' Silva & Ors. (2005 (1) ALL M.R. 825)***. Shri Sardessai has submitted that although the case of ***Porbuko Uma Mandrekar***(Supra), was a case under the Goa Daman & Diu Agricultural Tenancy Act, 1964, the same principle would be applicable to the case at hand as well. In the aforesaid case, it was stated by this Court that the defendants having taken a plea that they were tenants which plea was prima facie substantiated and the Civil Court had framed an issue of jurisdiction and the plaintiff had not taken steps to get the said issue deleted in the course of the trial of the suit or any time thereafter, and therefore, there was no other option to the learned Trial Court than to direct the defendants to obtain a declaration

from the Mamlatdar in respect of the plea of tenancy taken by the defendants in case the defendants had succeeded in the said plea, all that the plaintiff would be entitled to was only to receive the purchase price of the land of which the defendants would be the tenants. This Court further held that the learned trial Court could not have decided the issue of tenancy as was done by the learned trial Court since the jurisdiction to decide the same was exclusively given to the Mamlatdar by the provisions of the said Act.

In my view, the said observations are inapplicable to the case at hand. There can be no dispute that whether a person is a mundkar or not has got to be necessarily decided by the Mamlatdar by virtue of Section 8A read with Section 31(2) of the Goa Daman & Diu Mundkars (Protection from Eviction) Act, 1975. However, the question is whether the said issue at all arose from the pleadings of the parties. Issues are framed when material propositions of fact or law are affirmed by one party and denied by other. The question whether the defendants were the mundkars of the plaintiffs or not did not arise in the suit at all because the plaintiffs had not sought the eviction of the defendants from suit structure 'B' and in fact the plaintiffs had admitted in their evidence that the defendants were their mundkars in respect of structure 'B'. What the plaintiffs had

contended was that the other structures namely 'A', 'C' 'D' and 'E' were subsequently constructed by the defendants in their property and, on that count, had sought their demolition. The learned First Appellate Court held and in my view rightly, that the Trial Court did not fall into error in holding that the structures 'A', 'C', 'D' and 'E' were encroachments which entitled the plaintiffs for their demolition and further held that the Trial Court had not fallen in error except in the operative part of the Judgment wherein the learned Trial Judge gave protection to the structures falling within the mundkarial area, which he had otherwise held as illegal and to that extent, the Judgment was erroneous.

9. As already stated, the suit of the plaintiffs was not for the eviction of the defendants from the suit structure 'B', which according to the plaintiffs was the mundkarial house of the defendants but was for demolition of the other structures identified as 'A', 'C', 'D' and 'E', which according to the plaintiffs, were erected by the defendants from time to time as stated herein above. In this context, reference could be made to Section 7A of the Mundkar Act which prohibits a mundkar from reconstructing the dwelling house beyond existing plinth area. In such a situation, the issue whether the defendants were mundkars or not did not

arise at all and the only issue/s which arose from the pleadings of the plaintiffs was whether the said structures identified by the plaintiffs as 'A', 'C', 'D' and 'E' were constructed by the defendants in a manner alleged by the plaintiffs and in case the plaintiffs had succeeded in proving that they were so constructed, then the plaintiffs would have been entitled to the prayer (a) of the plaint. This has been the consistent view of this Court beginning with the case of ***Zuari Real Estate Company Private Limited v. Shri Thomas Souza (2002 (2) GLT 78)***, wherein this Court held that if the plaintiff proved his case as pleaded in the plaint, then the question as to whether the contesting respondent was the mundkar or not did not arise at all and, ending with the case of ***Siridao Estate Private Limited v. Smt. Sita Rama Kankonkar,*** (unreported decision of this Court dated 02.09.2005 in Second Appeal No. 53/1997). Since the said issue did not arise at all the fact that the Trial Judge proceeded to decide the same is of no assistance to the case of the plaintiffs. The said wrong decision by the Trial Court was set right by the learned First Appellate Court by holding that Trial Court did not fall in error in holding that the structures 'A', 'C', 'D' and 'E' were encroachments which entitled the plaintiffs to demolish the same. Question (a) did not arise in the suit and, therefore, cannot now arise as a substantial question of law. Therefore the same is answered

accordingly and against the defendants.

10. As regards to question (b), it has been submitted by Shri Sardessai that the suit of the plaintiffs being for mandatory injunction simpliciter, and which was filed on 02.05.1989, was clearly time barred, as far as the structures 'C', 'D' and 'E' are concerned because as far as the said structures are concerned, it was filed after a lapse of more than three years. Shri Sardessai has submitted that prayer (a) in the plaint of the plaintiffs did not seek for the recovery of possession and had the plaintiffs done so, then the suit would have been within time since a suit for recovery of possession could be filed within twelve years from the date of the cause of action. Shri Sardessai, has further submitted that even in case the said structures were demolished, then the plaintiffs would continue to be in possession of the property under the structures so demolished. According to him, prayer (b) could be termed as a consequential prayer to prayer (a).

On the other hand, it has been submitted by Shri Thali, on behalf of the plaintiffs, that prayer (a) in fact amounts to recovery of possession as rightly held by the learned Appellate Court. Shri Thali has submitted that issue of limitation was not raised before the First Appellate

Court and cannot be raised for the first time in Second Appeal.

11. Shri Thali has placed reliance on the decision of this Court in the case of ***Miss Aura Serafina Crispina de Souza v. Vitorino Mendonsa*** (SA No. 44/2002 decided on 25.11.2004 and 02.12.2004), wherein this Court after referring to the case of ***Santosh Hazari v. Purushottam Tiwari*** ((2001) 3 SCC 179), had stated that the word "substantial", as qualifying "question of law" means – of having substance, essential, real, of sound worth, important or considerable and to be "substantial" a question of law must be debatable, not previously settled by law of the land or a building precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case or

not. The paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

12. Section 3 of the Indian Limitation Act, 1963, provides for bar of limitation, and, inter alia, provides that every suit instituted, appeal preferred, etc. after the prescribed period shall be dismissed although limitation has not been set up as a defence. Such is the sweeping effect of Section 3. It does appear that the defendants had raised the plea of limitation before the First Appellate Court though slightly differently. The learned Appellate Court had observed that the plaintiffs had pointed out that defendant no.1 despite being an Advocate had waited for several years to file the suit even though the defendants had claimed that the extensions and additions were done several years earlier and that the said arguments could be squarely met by the fact that twelve years period of limitation was available to the party for recovery of possession. Reference has been made on behalf of the defendants to Article 113 of the Indian Limitation Act,1963, which provides a period of three years for filing a suit for which no period of limitation is provided elsewhere in the schedule that being three years from the date the right to sue accrues. As can be seen from prayer (a) of

the plaint, which has been reproduced herein above, it is clear that the plaintiffs had filed the suit in respect of the suit structures 'A', 'C', 'D' and 'E' only for their demolition by way of mandatory injunction simpliciter and not for recovery of possession of the property or portions thereof covered by the said structures. Prayer (b) of the plaint was by way of consequential relief sought by the plaintiffs by way of permanent injunction to restrain the defendants from interfering in any portion of the suit property in any manner whatsoever. The plaintiffs did not seek recovery of possession of the property which was covered by the said structures 'A', 'C', 'D' and 'E' as such, and being so, the plaintiffs were required to file the suit after the said extensions, within the period of three years from the date of accrual of the cause of action in respect of the said structures and the plaintiffs having not filed the same within three years, and as far as structures 'C', 'D' and 'E' were concerned, prayer (a) of the plaint was clearly time barred and the suit could not have been decreed in terms of prayer (a) as far as the demolition of the said structures 'C', 'D' and 'E' are concerned. In other words, the structure 'C' was constructed in October 1983, 'D' in the year 1978 and 'E' in October, 1983 and the suit was filed after lapse of more than three years therefrom only on 02.05.1989. A plea of limitation which can be answered on the basis of material produced, and in this case from the very allegations

in the plaint is a plea which goes to the root of the matter or very foundation of the case of plaintiffs and, in such a situation, a plea of limitation can be raised as a substantial question of law in Second Appeal. Reliance placed on ***Sant Lal Jain Vs Avtar Singh (AIR 1985 S.C. 857),*** is totally misplaced because that was a case of delay only which might have disentitled discretionary relief and the suit was for possession of shed though couched in the form of mandatory injunction. Again, if Section 3 of the Limitation Act provides that plea of limitation is required to be considered by the Court irrespective of whether it is set up as a defence or not, there is no reason why the plea of limitation cannot be considered in a Second Appeal more so when such a plea is based on the very averments in the plaint. Learned Advocate Shri Thali, on behalf of the defendants, has not been able to point out to any decision which holds to the contrary. Reliance placed on ***Banavasi Das v. Kanshi Ram & Ors. (AIR 1963 Sc 1165)***, is again misplaced. What was held therein is that a new plea of limitation which is a mixed question of facts and law should not be allowed to be raised first time in Section Appeal. That is not the case herein. I am, therefore, of the view that prayer (a) as far as demolition of the structures 'C', 'D' and 'E' could not have been granted by the First Appellate Court and to that extent, the suit of the plaintiffs ought to have been dismissed as

being time barred. Question (b), therefore, is answered in favour of the plaintiffs.

13. Consequently, this Second Appeal deserves to succeed partly in that in terms of prayer (a) the plaintiffs would be entitled for the demolition only of structure 'A' identified by the plaintiffs and not structures 'C', 'D' and 'E', regarding which, filing of the suit was clearly time barred. Considering the facts, there will be no Order as to costs.

N. A. BRITTO, J.

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